

4 *Issues related to the majority status of the currently recognized or certified labor organization and/or defunctness*

Section 7111(b)(2) of the Statute permits the filing of a petition seeking clarification of, or an amendment to, a certification then in effect or a matter relating to representation. Based on current Authority case law, three types of petitions may be filed under this section that raise issues related to the majority status of the currently recognized or certified labor organization:

1. petitions questioning the continued majority status of the recognized or certified labor organization which are generally filed by agencies;
2. petitions filed by an exclusive representative to amend its certification in which the investigation raises a reasonable cause to believe a question of representation (QCR) or defunctness exists; and
3. questions of defunctness of the exclusive representative which is an interrelated, but not identical, concept.

In the three scenarios, section 7111(b)(2) provides, in relevant part, that if a petition is filed with the Authority:

by any person seeking . . . an amendment to, a certification then in effect or a matter relating to representation; the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after a reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an election on the question by secret ballot and shall certify the results thereof. . . .

The Authority stated in *U.S. Department of the Interior, Bureau of Land Management, Phoenix, Arizona (BLM)*, 56 FLRA 202, 206 (2000) that “[c]onsistent with the plain wording of this section, if in investigating a petition to amend a certification there is reasonable cause to believe that a QCR exists, then an opportunity for a hearing on the matter ‘shall’ be provided. This statutory requirement is not discretionary and does not depend on the type of petition filed. Rather, it depends on whether there is reasonable cause to believe that a QCR exists. The Authority noted, in

this respect, that § 2422.1 of the regulations provides for only one type of petition.

Petitions that raise majority status issues that are filed by a labor organization that is not a party to the exclusive bargaining relationship and are not accompanied by a thirty percent showing of interest are set for hearing as to the standing of the petitioner to file such a petition (see *CHM* 23.9.2).

- A. Timeliness considerations:** Absent unusual circumstances, a petition challenging the majority status of an exclusive representative must be filed in accordance with the timeliness requirements of the Statute and regulations. See *Department of State, Bureau of Consular Affairs, Passport Services*, 35 FLRA 1163 (1990); *RCL 11 - Timeliness*. Examples of unusual circumstances are when a union is defunct or in a situation in which the petitioner seeks to amend its own certification due to a change in affiliation or merger (*RCL* 7).
- B. Good faith doubt as to union's continued majority status:** A party filing a petition asserting a good faith doubt as to the continuing majority status of an exclusive representative is not required to prove that an actual numerical majority of employees opposes the union. Rather, the party must demonstrate objective considerations sufficient to support a conclusion that a reasonable doubt exists that a union continues to represent a majority of employees in an existing unit. The factors asserted to support a good faith doubt as to majority status must be viewed both in their context and in combination with each other, in determining whether such doubt is warranted. *Overseas Private Investment Corporation (OPIC)*, 36 FLRA 480, 484-85 (1990). The Authority does not determine whether the union continues to be the exclusive representative of employees; that determination is made by the employees themselves through the election process. The Authority determines whether, based upon objective considerations, a good faith doubt exists that the union continues to represent a majority of employees. If so, an election is conducted to determine the exclusive representative, if any, in the unit.

Objective considerations sufficient to support a conclusion that a reasonable doubt exists are, for example:

- ▶ lack of officers or representatives of a union;
- ▶ lack of a collective bargaining agreement;
- ▶ lack of demands to bargain in response to management proposed changes;

- ▶ few employees on automatic dues withholding;
- ▶ long periods of dormancy by the union, etc.

See *Department of the Interior, National Park Service, Western Regional Office, San Francisco, California*, 10 FLRA 502 (1982); *Department of the Interior, National Park Service, Western Regional Office, San Francisco, California*, 15 FLRA 338 (1984); and *OPIC*. An incumbent's attempt to revive itself once the petition had been filed asserting a good faith doubt of continued majority status does not overcome the good faith doubt as to continued majority status. *OPIC*.

- C. Petition to amend a certification:** Generally, such petitions are filed when the exclusive representative seeks to change its affiliation or merge with another union pursuant to the *Montrose* requirements discussed at *RCL* 7. The number of union members in the bargaining unit compared with the total number of employees in the bargaining unit may raise a question concerning representation which the Region investigates by following the outline discussed below. If the Regional Director determines that there is reasonable cause to believe that a QCR exists, an opportunity for a hearing is provided. If on the record of the hearing, it is determined that a QCR exists, the Regional Director supervises or conducts an election on the question, as appropriate. If the Regional Director finds there is no reasonable cause to believe that a QCR exists with respect to the unit, the Regional Director, based on record facts, dismisses the petition or grants the amendment. *BLM*, 56 FLRA at 206.

An unresolved issue is whether all of the factors discussed in *OPIC* must be present in order for a QCR to be present in this type of petition as well. In *OPIC*, the Authority stated that “[w]hile a low level of membership, standing alone, would not support a doubt as to majority status, neither does it contribute to overcoming the doubt that reasonably results from a lengthy period of virtually total inactivity.” *OPIC*, 36 FLRA at 486.

- D. Defunctness:** The exclusive representative is held to be defunct when it is either unwilling or unable to represent employees. If it is determined that the union is defunct and has ceased to represent employees, this represents an unusual circumstance warranting the filing of a petition at any time, without regard to the timeliness requirements of the Statute. Further, if the union is held to be defunct, the petition does not necessarily result in an election among the affected employees. In the absence of intervenors in the representation case, granting a petition asserting defunctness results in a finding, without conducting an election, that there is no exclusive representative in the unit. See *Duluth International Airport, 4787th Air Base Group, Duluth, Minnesota*, 15 FLRA 858 (1984).

See HOG 40 for specific guidance on developing a record about this topic at hearing.

Other references:

Celanese Corp., 95 NLRB 664 (1951); *Thomas Industries, Inc. v. NLRB*, 687 F.2d 863, 868 (6th Cir. 1982); *Dalewood Rehabilitation Hospital, Inc. v. NLRB*, 566 F.2d 77, 80 (9th Cir. 1977) cited in *OPIC*.

Department of State, Bureau of Consular Affairs, Passport Services, 35 FLRA 1163 (1990).